IN THE MISSOURI SUPREME COURT

No. SC84518

STATE OF MISSOURI,

Respondent,

vs.

CHARLES L. RUTTER,

Appellant.

Appeal from the Circuit Court of Iron County, Mo.
42nd Judicial Circuit, Division II
The Honorable Max Price, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from convictions for murder in the first degree, §565.020, RSMo 2000, and armed criminal division, §571.015, RSMo 2000, obtained in the Circuit Court of Iron County and for which appellant was sentenced to concurrent terms in the custody of the Department of Corrections of life without eligibility for probation or parole for murder in the first degree and life for armed criminal action. The appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. Therefore, the Missouri Court of Appeals, Southern District, had jurisdiction. Article V, §3, Missouri Constitution (as amended 1982). This appeal is properly before the Missouri Supreme Court because of this Court's June 25, 2002, order or transfer. Rule 83.04

STATEMENT OF FACTS

Appellant, Charles Rutter, was charged by information with murder in the first degree and armed criminal action (L.F. 31-34). In July of 2000, the cause went to trial before a jury in the Iron County Circuit Court, the Honorable Max J. Price presiding (Tr. 1-2; L.F. 115).

The sufficiency of the evidence to support appellant's convictions is not in dispute. Viewed in the light most favorable to the verdicts, the following evidence was adduced: the victim, eighteen-year-old Michael Hinkle, lived with his grandmother, Joan Hinkle (Tr. 506, 670). On Saturday April 3, 1999, he had a wreck on a dirt bike and ran into a stop sign (Tr. 508, 670). When the victim arrived home that night, Joan Hinkle "doctored" the scratches that he had on his hands from that accident (Tr. 508). The victim then went to the home of a friend, Steve Konick, and spent the night there (Tr. 262-263).

The next morning, Easter Sunday April 4, 1999, the victim got up at around 9:30 a.m. and left Konick's home at about 10:10 a.m. (Tr. 263-264). Konick's step-mother saw the victim at a pay telephone in Des Arc at about 10:15 a.m. (Tr. 265).

The victim went to the home of appellant, who was thirty-three years old at the time of his trial (Tr. 610, 670). Appellant and the victim were good friends and the victim's family treated appellant as if he was a member of their family (Tr. 507). Appellant lived in a house on Highway 49 just outside of Des Arc (Tr. 278-279). The house was owned by Donald Wright, who was appellant's cousin (Tr. 780-781). Wright allowed appellant to live there for free because appellant was a relative and was on social security as the result of having a non-malignant brain tumor since 1991 (Tr. 517, 607, 788).

On the day of the murder, the victim somehow ingested a near toxic dose of appellant's butalbital, which is a sedative that is used to relieve pain from migraine headaches (Tr. 382-384, 435, 450-458, 670-671, 690-691). The concentration in the victim's blood, 6.3 micrograms per milliliter, probably caused the victim to become sedated and drowsy and would not have caused excitement or violence (Tr. 437, 462).

While the victim was in the living room of appellant's home and was impaired with this drug, appellant came up behind the victim and purposely shot him in the back of the head from a range of about

six inches with his 9 millimeter Ruger pistol (Tr. 309, 311, 317, 351-353, 419, 432, 666-669, 700). Appellant dragged the victim from the living room to the bathroom and put him into the bathtub (Tr. 291, 375, 513, 653-654). Appellant then began using numerous rags in an attempt to clean up the large amount of the victim's blood in the living room and bathroom (Tr. 276, 687).

Between 10:30 a.m. and 11:00 a.m. that morning, Edward Fisk, appellant's next-door neighbor who lived about 120 feet away from appellant, stood outside his house and waited for his wife who was inside their house getting ready for them to go visit some neighbors (Tr. 215). While he stood there, he heard crashing sounds coming from appellant's home like something was being thrown down (Tr. 216-217). He looked towards appellant's home and saw a person who was dressed in a white shirt and dark pants (Tr. 217-218). This was not the victim because the victim was wearing a dark shirt and jeans (Tr. 247-249). The person went into appellant's house (Tr. 218). Fisk then heard noises like glass breaking and walls getting torn out (Tr. 218). He did not hear any gunshots (Tr. 219).

Appellant went to the home of his stepfather, Billy Luten, and his mother in Des Arc (Tr. 797-798, 832). Luten lived about a quarter of a mile from appellant (Tr. 671). Luten saw that appellant had a black eye and a cut under an eye (Tr. 798). Appellant told Luten that he had shot the victim (Tr. 799). Luten asked whether appellant had called the ambulance or the Sheriff's Department and appellant said no (Tr. 799). Luten told appellant to call them (Tr. 799). However, appellant never did that (Tr. 681-682). Luten went to tell appellant's mother what had occurred (Tr. 799).

During a church service at the First Assembly of God Church in Des Arc, appellant's aunt, Delores Wright, approached the pastor, Donald Dement, and asked him to go to appellant's house because there had been a shooting (Tr. 227). Dement asked one of his deacons, Jerry Mann, to come with him, and they went to appellant's house (Tr. 228, 272-273).

When they arrived at appellant's house, they did not see anybody there (Tr. 230). The door was locked and they could not get inside (Tr. 274). Then Luten arrived (Tr. 230). He indicated that appellant was at Luten's house, but that he did not know where the victim was (Tr. 230).

Dement and Mann went to Joan Hinkle's house and asked her where the victim was (Tr. 230).

She said that she did not know (Tr. 231, 274). They did not want to upset her so they told her that there had been an accident and did not say that there had been a shooting (Tr. 275). Dement, Mann and Hinkle went back to appellant's house (Tr. 231). Luten arrived there again after they arrived (Tr. 231-232).

After they unsuccessfully tried to force a door open, appellant came to the door, unlocked it, and let them in (Tr. 232-233, 275). The house was full of trash, which was normal (Tr. 512-513). However, there was substantial damage to the house, including windows that were broken out and lights that were broken (Tr. 232, 234, 281). There was blood on the living room carpet and a trail of blood that led into the bathroom (Tr. 235, 276, 291, 375).

Dement asked appellant where the victim was, and appellant told him that the victim was in the bathroom (Tr. 235). They found the victim's body in the bathtub in the bathroom (Tr. 236, 276). He was cold to the touch, had no pulse, and there were green flies all over him (Tr. 246, 514). He had been killed by a gunshot wound to the back of his head from appellant's pistol (Tr. 351-353, 412-414). The victim had numerous injuries to his head from blunt trauma (Tr. 414-415). He had bruises to his temples, the center of his forehead, and around his left eye (Tr. 414). He also had abrasions around the corner of his mouth, on his arm, and on the knuckles of both of his hands (Tr. 415).

Hinkle went outside to where appellant was then located and asked appellant why he killed her boy (Tr. 514). Appellant said that the victim was mad and out of control (Tr. 514). Hinkle asked appellant if that gave him the right to murder (Tr. 515). Appellant dropped his head and did not verbally answer this question (Tr. 515).

Mann went outside to wait for law enforcement officers to arrive (Tr. 277). While he was waiting, he asked appellant what happened (Tr. 279). Appellant said that he had to kill the victim because they had a fight and he feared for his life (Tr. 279). He said that he shot the victim (Tr. 279).

When law enforcement officers arrived on the scene at about 1:45 p.m., they found appellant's 9 millimeter pistol on a chair (Tr. 306, 309, 336-337). A pocket knife was found in the victim's jeans pocket (Tr. 332, 482). No other weapons were found in the house (Tr. 252, 281, 332, 377, 485). A shell casing that had been fired in appellant's pistol was found near the doorway of a closet in the living room area (Tr.

352, 485).

Appellant testified on his own behalf. He said the victim may have gotten into his medicine without him knowing about it, though he did not know how that could have occurred (Tr. 690).[1] He said that on April 4, 1999, the victim beat him up (Tr. 621-622). He said that he sat in his house with his pistol and watched as the victim walked around and trashed his house (Tr. 610-649). He said that he did not shoot the victim until the victim reached into a closet that contained guns (Tr. 653-654). He said that he purposefully shot the victim because he thought that the victim was going to kill him (Tr. 668-669, 700). Appellant attempted to demonstrate in court how he came up behind the victim on the right side, held the gun in his right hand, and shot the victim in the *left* side of the back of his head, but he could not demonstrate how he shot the victim in that side of the head (Tr. 676-677). Appellant presented the testimony of other witnesses in an attempt to show that there were rifles and a shotgun in the closet at the time of the shooting, but that they were removed from the crime scene by appellant's family members after the police searched the crime scene and did not find any guns in the closet (Tr. 725, 742, 792, 802).

Joan Hinkle testified as a rebuttal witness for the State that she spoke to appellant a week to ten days before the murder about the guns that were in his house (Tr. 830). Appellant told her that he had removed all of the guns from the house except for his 9 millimeter pistol, and that he had placed those guns in the home of his mother and step-father (Tr. 832). He said that he kept the pistol because the pistol did not go anywhere but with him (Tr. 832).

At the close of the evidence, instructions and argument of counsel, the jury found that appellant was guilty as charged (L.F. 111-112). Appellant was sentenced to concurrent terms in the custody of the Department of Corrections of life without eligibility for probation or parole for murder in the first degree and life for armed criminal action (L.F. 137-138).

On April 25, 2002, the Court of Appeals, Southern District, affirmed appellant's convictions and

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[1]At the time of his arrest, appellant had a bottle of this medication that only contained three pills, even though it had been refilled the day before the murder (Tr. 382-383).

sentences. State v. Rutter, No. SD23851 (Mo.App., S.D. April 25, 2002). However, on June 25, 2002, this Court granted appellant's motion to transfer the case.

ARGUMENT

I.

This Court should not review appellant's claim that the trial court erred "in allowing the trial testimony" of Deputies Helton and Young that they did *not* see guns in appellant's closet because this claim of a violation of the Fourth Amendment to the United States Constitution is raised for the first time on appeal and this has denied the State a fair opportunity to present evidence and respond to the claim and it has denied the trial court a fair opportunity to rule on the claim.

Further, the trial court did not commit plain error when it did not exclude said testimony on its own motion because (1) the officers' testimony was admissible pursuant to the exigent circumstances exception to the search warrant requirement in that the officers were permitted to enter the house in response to the report of a shooting in that house and to see items that were in plain view, including inside the closet, as they looked for the victim and looked in places where additional victims or perpetrators could be found, (2) the testimony in question would inevitably have been obtained through the use of a search warrant, (3) appellant waived any Fourth Amendment claims concerning the admission of that evidence by telling the jury in his opening statement that he was going to present evidence about the contents of the closet and by then doing so, and (4) appellant failed to show that manifest injustice resulted from the trial court's actions.

Appellant's first point relied on alleges that the "trial court erred in allowing the trial testimony" of Deputies Chuck Helton and Brian Young concerning the examination of the interior of a closet in his home because officers violated his Fourth Amendment Right against unreasonable searches when they looked in the closet and did not see the guns that appellant claimed that the victim reached for when appellant shot him in the back of the head (Appellant's Substitute Brief 43; Tr. 674-678). Appellant does not challenge the admissibility of the testimony of non-police officers who testified about this same matter (Appellant's

Substitute Brief 43). However, as will be explained below, this issue was not raised in appellant's motion to suppress or at trial, this claim is without merit, and appellant cannot show that manifest injustice resulted from the admission of the evidence in question.[2]

A. This Court should refuse to review this claim because it was raised for the first time on appeal

Appellant's claim that the trial court "erred in allowing the trial testimony" of Deputies Helton and Young that they did not see guns in appellant's closet should not be reviewed because it was not raised before the trial court.

Appellant was required to raise his claim before trial in a written motion to suppress "so the basis of the claim of unlawful search or seizure will be known, giving the state a fair chance to respond and the trial court fair opportunity to rule on the claim. This rule helps to eliminate the possibility of sandbagging with respect to an issue no relating to guilt or punishment." State v. Galazin, 58 S.W.3d 500, 504-505 (Mo.banc 2001)(citation omitted). However, he did not raise this claim in his motion to suppress. His motion to suppress asked:

> to suppress as evidence any and all articles seized and intended to be used against the Defendant in this cause and now being held by either the arresting officers or the Prosecuting Attorney's Office, and any and all testimony regarding any observations made of the Defendant's person while he was under arrest.

(L.F. 37). None of this has to do with officers' observations as to the closet in appellant's house.[3]

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[2]Appellant appears to have abandoned claims concerning the admissibility of the gun and other physical evidence that was seized because of his testimony that he was the person who shot the victim. See State v. Pate, 859 S.W.2d 867, 870 (Mo.App., S.D. 1993)(No prejudice resulted from the admission of inadmissible evidence that was cumulative to the defendant's testimony).

[3]Appellant's motion, cited above, shows that appellant knew that he had to move to suppress observations if he wanted them suppressed because he did move to suppress the observations of his person

While it is true that appellant then alleged as "grounds" for suppressing ***the above listed evidence*** being illegally seized his claim that "[t]he search was made without authority and without a search warrant" and that "[s]aid search and seizure , thus violated Defendant's rights under Article I, Sections 10, 15, and 18(a) of the Missouri Constitution, and Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution," these grounds were only alleged to pertain to the evidence listed above which is not relevant to this point on appeal (L.F. 37-38). A copy of appellant's motion to suppress is found in the appendix of this brief so that this Court can more easily examine it without any language being taken out of context (A-1 to A-2).

The prosecutor was never given an opportunity to respond to this claim and present evidence specifically addressing it and the trial court was never given an opportunity to address it because this claim is raised for the first time on appeal. A specific objection must be made when the evidence is offered at trial. State v. Rodgers, 899 S.W.2d 909, 911 (Mo.App., S.D. 1995). This gives the trial court the opportunity to reconsider its pretrial ruling in light of evidence that has been adduced during the trial. State v. Stephen, 941 S.W.2d 669, 674 (Mo.App., W.D. 1997). This should be fatal to appellant's claim because "[a] trial court will not be convicted of error in admitting testimony for a reason not presented to it, hence reasons urged in a brief which were not advanced to the trial court are of no avail." State v. Ard, 11 S.W.3d 820, 828 (Mo.App., S.D. 2000).

Here, the record shows that Deputy Chuck Helton testified without objection about finding the victim's body in appellant's bathroom, the murder weapon in a chair in appellant's house, about observing the closet, and about finding a 9 millimeter shell casing on the floor by the closet's door (Tr. 308-312). When the prosecutor asked if Deputy Helton wanted to open the package that contained the shell casing, the parties approached the bench (Tr. 312-313). Appellant then brought up the motion to suppress discussed above that pertained to "many of the items that were found in the residence" and stated that "for [the] purpose of preserving that from this point forward I would like the record to reflect that this will be

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while he was under arrest (L.F. 37).

a continuing objection with respect to each and every item that was seized prior to the search warrant being obtained" (Tr. 313). Again, the motion to suppress did not pertain to the evidence in question and appellant's claim on appeal does not pertain to an item that was seized.

Appellant did not raise any objections during the testimony of Deputy Young. He said that he searched the closet in question and did not find any weapons in it (Tr. 485).

Nor was appellant's claim raised in appellant's motion for a new trial. Appellant's allegation there again referred to the ruling on the motion to suppress and the admission of exhibits into evidence (L.F. 116-117). Thus, appellant's allegation should fail because it was not raised below.

B. Appellant's claim is without merit

Even though appellant waived his claim by failing to raise it below and has not requested plain error review, respondent will address it in case this Court decides to disregard the above and chooses to perform discretionary review for plain error.

The assertion of plain error places a much greater burden on a defendant than when he asserts prejudicial error. State v. Hunn, 821 S.W.2d 866, 869 (Mo.App., E.D. 1991). A defendant must not only show that prejudicial error occurred, he must further show that the error so substantially affects his rights that manifest injustice or a miscarriage of justice will inexorably result if left uncorrected. Id. at 869-870.

1. Relevant facts concerning the searches

In the case at bar, the evidence shows that numerous individuals arrived at the scene of the crime and went into appellant's house before the first law enforcement officer, Deputy Chuck Helton, arrived there at 1:45 p.m. (Supp.Tr. 26-27; Tr. 233-234, 275-276, 289, 306, 719-724). When Deputy Helton arrived after being dispatched to the scene because of a reported shooting, an ambulance personnel, Lenny Warren, told him that someone in the house had been shot, and that said person was dead and in the bathroom (Supp.Tr. 26; Tr. 306). Deputy Helton went inside the house (Tr. 308). The doors to a closet by the living room had been kicked in and Deputy Helton did not see any guns in the closet (Tr. 328-329,

332, 485, 636).[4] There was a blood trail from the living room to the bathroom (Tr. 376). He went to the bathroom and saw the victim's body (Tr. 310). He then got everyone else out of the house and secured the scene (Supp.Tr. 36-37). He went over to appellant, who was sitting on the ground behind a car, and told him not to leave (Supp.Tr. 27).

Deputy Helton, other officers, and the coroner then went back into the house, searched it, and seized the murder weapon, the victim's body, and some other items (Supp.Tr. 37-40; Tr. 309, 311, 376, 483-484). Deputy Brian Young, who arrived on the scene after other officer were inside the residence, thoroughly searched the closet for shell casings or other evidence that might be there and did not see any guns in the closet (Tr. 485-486).[5]

Some non-police witnesses who had been in the house also testified about not seeing any guns or weapons in the house (Tr. 252, 281).

That night, after about five hours, the officers got a search warrant for the premises (Tr. 30; Supp.Tr. 39). Officers returned to the residence the next day to conduct another search of the premises (Supp.Tr. 31).

2. Analysis

a. The closet was in plain view during a valid search based on exigent circumstances

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[4]During cross-examination, Deputy Helton said that he did not recall when his observations of the closet occurred during the search (Tr. 329). Appellant's assertion that he said that it occurred in the middle of the search neglects to mention that in that same sentence Deputy Helton said that it may have occurred toward the beginning of the search and that he really did not recall when it occurred (Tr. 329; Appellant's Substitute Brief 36). However, since this claim is not preserved for appeal it is appellant's burden to prove when Deputy Helton observed the closet. State v. Galazin, supra at 505.

[5]Appellant alleges that Supp.Tr. 29-30 states that the search lasted for about three hours (App.Amended Br. 35). However, those pages of the record do not support appellant's assertion.

From the above it can be seen from that exigent circumstances existed that permitted officers to enter appellant's residence and conduct a search. The officers had been told that a person had been shot and was dead in the house. The officers could properly go to where the body was and search the entire house for other potential victims or perpetrators. While they were doing that, they could properly view anything that was in plain view, including the inside of the closet in question, and see that there were no guns in the closet. It is clear that the closet would have quickly attracted the officers' attention because of the blood and the shell casing on the floor outside of it and the fact that it had been kicked in (Tr. 235, 276, 311, 376, 485, 636).

It is well-established:

> ...when a law enforcement officer enters private premises in response to a call for help and thereby comes upon what reasonably appears to be the scene of a crime, and secures the crime scene from persons other than law enforcement officers by appropriate means, all property within the crime scene in plain view which the officer has probable cause to associate with criminal activity is thereby lawfully seized within the meaning of the fourth amendment. Officers arriving at the crime scene thereafter and while it is still secured can examine and remove property in plain view without a search warrant.

State v. Taylor, 857 S.W.2d 482, 486 (Mo.App., S.D. 1993)(quoting State v. Jolley, 321 S.E.2d 883, 886 (N.C. 1984), cert. denied 470 U.S. 1051 (1985)). While the officers are in the house, they may search for other possible victims or accomplices in the crime who have not been found. "The possibility of another victim or perpetrators in a house are sufficient exigencies to permit the police to undertake a cursory search of those places in the dwelling in which a body may be found or persons may hide." State v. Johnson, 957 S.W.2d 734, 744 (Mo.banc 1997), cert. denied 522 U.S. 1150 (1998)(This Court approved of part of a search that lasted for two hours from the time of the 911 call). If officers enter a house because of an exigent circumstance, they may leave the house and re-enter it to seize items that were seen in plain view when they initially entered a house so long as there is no "unwarranted delay in time" and is no expansion of the scope of the search. State v. Tidwell, 888 S.W.2d 736, 741 (Mo.App., S.D.

1994).

In the case at bar, the Court of Appeals properly concluded:

> As best we glean from the record, the searches by Dep. Helton, including the one conducted with Dep. Young, were undertaken within a short span of time after Dep. Helton arrived at the crime scene. These searches were completed rapidly. Given the exigent circumstances existing, each officer was within his right to peruse the crime scene looking either for additional victims or other perpetrators, together with any other weapons that may have been easily accessible to any perpetrator.

State v. Rutter, No. SD23851, slip op. at 8 (Mo.App., S.D. April 29, 2002).

While Deputy Young's conduct of crawling around in the closet with a flashlight looking for bullet casings and other evidence may not have been required by any exigent circumstance, he was simply looking in an area as to which appellant had no expectation of privacy because it had already been viewed, and he did not find and seize any evidence during this search (Tr. 485). He merely saw what had already been seen. See State v. Tidwell, supra.

b. Inevitable discovery

Even if the testimony in question was not the result of a lawful search, it was still admissible under the inevitable discovery doctrine because the evidence in question would have been discovered through other lawful means in that a search warrant was obtained a few hours after the search (Tr. 30; Supp.Tr. 39). See State v. McCullum, 63 S.W.3d 242, 256-267 (Mo.App., S.D. 2001); Nix v. Williams, 467 U.S. 431, 445, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

Appellant attempts to shift the burden of proof on this issue to the State (Appellant's Substitute Brief 63). However, as was discussed above, appellant bears the burden of showing that plain error resulting in manifest injustice occurred because this claim was not preserved for appeal, State v. Galazin, supra at 505; State v. Collins, 72 S.W.3d 188, 194-195 (Mo.App., S.D. 2002), and appellant failed to present any evidence on this matter.

Appellant also claims that the officers would not have been able to tell that no guns had been in the

closet during the shooting when they exercised their search warrant because appellant's family members had allegedly removed firearms from the closet in question after the police left the crime scene (Appellant's Substitute Brief 63; Tr. 781-788). However, appellant's argument improperly presumes that the trial court was required to believe the testimony of appellant's family members about the alleged removal of guns from the closet. It was not. Instead, it could have believed the testimony of Pastor Donald Dement, and Jerry Mann, who arrived at the scene before law enforcement authorities and had not seen the alleged guns in the closet, and it could have believed the similar testimony of Deputies Helton and Young (Tr. 252, 281, 332, 328-329, 485-486). The credibility of witnesses was for the trial court's determination, State v. Burkhardt, 795 S.W.2d 399, 404 (Mo.banc 1990), and on review this Court considers the facts and reasonable inferences from those facts in the light most favorable to the trial court's ruling. State v. Rodriguez, 877 S.W.2d 106, 110 (Mo.banc 1994).

For an additional reason, appellant has failed to prove that the officers would not have been able to view the closet without his relatives allegedly tampering with it if they had not conducted the search without a warrant. This is because he has failed to prove that the officers would have allowed his relatives into the house prior to the search with a warrant if the only search that they conducted was one pursuant to a warrant. Since this issue is not preserved for appeal, appellant has the burden of proof on this issue, State v. Galazin, supra at 505, and he failed to present any evidence on it. The State was not obligated to foresee that appellant would raise this issue on appeal and present evidence.

c. Appellant waived his claim by telling the jury that he was going to present evidence about the contents of the closet and by then doing so

Even if the evidence in question was inadmissible based on the matters discussed above, it was still admissible because appellant waived any right to have that evidence suppressed by telling the jury in his opening statement that he was going to present testimony on this subject, by testifying that there were guns in the closet, and by presenting other witnesses who testified that there were guns in the closet (Tr. 204-205, 208-210, 654, 725, 742, 758, 785, 792, 802). See State v. Skillicorn, 944 S.W.2d 877, 891-892 (Mo.banc 1997), cert. denied 522 U.S. 999 (1997) (defendant opened the door to testimony of a medical

examiner by injecting an issue into the case during his opening statement); State v. Borden, 605 S.W.2d 88, 90-91 (Mo. 1980)(prosecutor properly anticipated defense cross-examination of a witness and addressed it in voir dire, opening statement and direct examination). The State did not bring up this subject until after appellant brought it up in his opening statement (Tr. 204-205, 208-210).

For example, in United States v. Havens, 446 U.S. 620, 626, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980), the United States Supreme Court found that a trial court properly allowed a defendant to be impeached with illegally seized evidence. It reasoned that arriving at the truth is the fundamental goal of the legal system and that allowing a defendant to testify untruthfully without being impeached did not further this goal. Id. It stated that a defendant's constitutional shield against having illegally seized evidence used against him should not be "'perverted into a license to use perjury by way of a defense, free from confrontation....'" United States v. Havens, supra 446 U.S. at 626 (citation omitted); see also State v. Thomas, 698 S.W.2d 942, 949 (Mo.App., S.D. 1995). Similarly, in the case at bar manifest injustice could not have resulted from the State being permitted to put on evidence that prevented appellant from misleading the jury. Thus, appellant's claim must fail.

d. No manifest injustice

Additionally, appellant cannot show that plain error occurred, regardless of whether the officers' testimony was admissible. As was mentioned earlier in this brief, the assertion of plain error places a much greater burden on a defendant than when he asserts prejudicial error. State v. Hunn, supra at 869. A defendant must not only show that prejudicial error occurred, he must further show that the error so substantially affects his rights that manifest injustice or a miscarriage of justice will inexorably result if left uncorrected. Id. at 869-870.

An appellant cannot demonstrate manifest injustice from an alleged denial of a Fourth Amendment claim, because the use of the exclusionary rule has nothing to do with providing appellant with a fair trial and has absolutely nothing to do with the concept of manifest injustice. "The wrong condemned by the Amendment is 'fully accomplished' by the unlawful search or seizure itself,..., and the exclusionary rule is neither intended nor able to 'cure the invasion of the defendant's right which he has already suffered.'"

United States v. Leon, 468 U.S. 897, 907-908, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)(citations omitted). The exclusionary rule is a prophylactic rule that is designed to deter police misconduct, and it interferes with the truth-finding functions of the judge and jury. Id. Thus, the use of illegally seized evidence does not result in manifest injustice because it is more likely that the truth will be reached by the fact-finder it the evidence is not excluded, and because a Fourth Amendment claim "has no bearing on the basic justice of [an appellant's] incarceration." Stone v. Powell, 428 U.S. 465, 489, 491, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).[6] Accordingly, an appellant who has not preserved his claim for review should simply been seen as forfeiting his opportunity to attempt to punish law enforcement officers by suppressing evidence that resulted from alleged violations of his Fourth Amendment rights because he cannot show that manifest injustice resulted from a violation of the Fourth Amendment.

C. Summary

In light of the above, respondent submits that appellant's claim that the trial court erred when it allowed the testimony in question should not be reviewed because it was raised for the first time on appeal. This Court should not perform gratuitous plain error review on its own motion as to whether the testimony was admissible. That testimony, though, was admissible, appellant waived objections to it by presenting evidence concerning the same matter, and manifest injustice did not result from the trial court's actions. Thus, appellant's first point must fail.

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[6]In Stone v. Powell, supra 428 U.S. at 494-495, the United States Supreme Court concluded that where the State has provided a full and fair opportunity for litigation of a Fourth Amendment claim, a petitioner could not be granted federal habeas corpus relief on the ground that evidence that was introduced at his trial was obtained as the result of a unconstitutional search and seizure because in this context the contribution of the exclusionary rule was minimal and the costs to society from the application of that rule were substantial.

II.

The trial court did not commit plain error or abuse its discretion when it allegedly refused the offer of Dr. Terry Martinez as an expert at trial and declared him not to be an expert in the presence of the jury because appellant's allegation is refuted by the record in that it shows that the trial court allowed Dr. Martinez to testify in front of the jury as an expert, appellant did not make an offer of proof showing that Dr. Martinez could have testified as an expert on something in addition to what he did testify, appellant was responsible for the ruling being done in presence of the jury, and appellant did not object to this procedure or request any corrective action.

Appellant alleges that "the trial court erred in refusing the offer of Dr. Terry Martinez as an expert at trial and in declaring him not an expert in the presence of the jury..." (Appellant's Substitute Brief 68). Appellant neglects to mention that he did not object at trial to the trial court ruling in front of the jury, and that the reason that the ruling was done in front of the jury was that appellant offered Dr. Martinez as an unlimited expert in front of the jury. Nevertheless, the Court of Appeals rejected this claim because it was not supported by the record. State v. Rutter, No. SD23851, slip op. at 11-12 (Mo.App., S.D. April 29, 2002).

The record shows that appellant called Dr. Martinez, who was a clinical toxicologist and a pharmacologist, to testify (Tr. 529). In the presence of the jury, appellant's counsel offered Dr. Martinez as an expert without stating what subject Dr. Martinez would be an expert in (Tr. 534). He said that he was offering Dr. Martinez "as an expert for testimony here today" (Tr. 534).

The prosecutor responded to this offer of Dr. Martinez as an unlimited expert by asking for the opportunity to voir dire him (Tr. 534). During this voir dire, Dr. Martinez revealed that he was not a physician (Tr. 535).

The prosecutor objected to appellant's offer of Dr. Martinez as an unlimited expert (Tr. 534-535). The trial court sustained the prosecutor's objection and indicated that it consider the objection as to each question, but that appellant should proceed with questioning Dr. Martinez (Tr. 536). In other words, the

trial court found that Dr. Martinez could testify on matters within his expertise, but that he could not testify on matters outside of his expertise.

Appellant then proceeded to elicit expert testimony from Dr. Martinez. This testimony included the following: He reviewed the findings and the deposition of State's expert Dr. Christopher Long that indicated that the victim had a concentration of 6.3 micrograms of a drug called butalbital in each milliliter of his blood (Tr. 536-537). He said that butalbital is a sedative (Tr. 540). He said that he had observed individuals who had a concentration of 6.3 micrograms per milliliter of butalbital in their blood and that they would appear like they were intoxicated from alcohol (Tr. 541). He said that such individuals have problems with fine motor movement and would be disinhibited (Tr. 541). He said that he had seen such persons act aggressive (Tr. 542). He described texts that he had read dealing with pharmacology (Tr. 543-545). He said that what was in the texts was consistent with his observations of persons on butalbital and what he had testified to in court in this case (Tr. 545). The trial court sustained some objections to questions to Dr. Martinez, but appellant did not make any offers of proof to show what was excluded (Tr. 537, 539-54, 542).

On cross-examination, Dr. Martinez said that he did not do any testing in this case and that he trusted Dr. Long's test results (Tr. 546). He said that Dr. Long's conclusions and some of the textbooks that he had read on how fast-acting butalbital is were wrong (Tr. 558-559). He said that in criminal cases he worked almost entirely for defendants (Tr. 556). He said that he did not get paid for testifying in this case because he was paid a salary by the company that he worked for (Tr. 556-557). He then admitted that his wife owned that company (Tr. 557).

Defense counsel used Dr. Martinez's testimony during closing argument. Counsel argued:

> Let's move on to the Butalbital that was found in his system, in Hinkle's system.... I want you to look at his credentials. It's been introduced into evidence. The honors that he was won, what he's done in his field, how long he's been in practice and his curriculum vitae.... This man is a renowned expert and he's used to working with this subject.... Dr. Martinez worked with particular people on this particular drug. Observed behavior by these people

> on this drug. He's been involved with over 30,000 types of patients because he is a clinical toxicologist. He has seen the effects, not just on paper. And he's researched, not just one little page of research but he brought the books he researched. And what his findings were and what his conclusions were is that this causes aggressive behavior in this amount, that it's like an alcohol intoxication. You've heard him testify and that's what happened here.

(Tr. 881-882).

Qualification of an expert is a matter resting primarily within the sound discretion of the trial court. State v. Hoff, 904 S.W.2d 56, 58 (Mo.App., S.D. 1995). A trial court will be found to have abused its discretion when a ruling is "clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate careful consideration; if reasonable persons can differ about the propriety of the actions taken by the trial court, then it cannot be said that the trial court abused its discretion." State v. Mathews, 44 S.W.3d 658, 660 (Mo.App., S.D. 2000). Expert testimony should be excluded if it does not assist the jury. State v. Love, 963 S.W.2d 236, 241 (Mo.App., W.D. 1997)(Trial court did not abuse its discretion by excluding some of a defense witnesses testimony because although she was qualified to testify generally as a DNA expert, she was not qualified to testify as to forensic DNA methodology).

As can be seen from the above, contrary to appellant's assertions on appeal, the trial court did not refuse the offer of Dr. Martinez as an expert and declare that he was not an expert. Although the trial court rejected appellant's offer of Dr. Martinez as an unlimited expert, it allowed him to testify as an expert on toxicology and pharmacology.

It is well settled that where, unlike the present case, the trial judge improperly excludes evidence proffered by the defendant, reversal will not be warranted if the jury received the gist of the testimony defense counsel attempted to develop. State v Schneider, 736 S.W.2d 392, 401 (Mo.banc 1987), cert. denied 484 U.S. 1047 (1988); State v. Gilmore, 681 S.W.2d 934, 940 (Mo.banc 1984).

Appellant has failed to show that Dr. Martinez was not permitted to testify as to anything. He failed

to make an offer of proof showing what evidence he was precluded from adducing. State v. Purlee, 839 S.W.2d 584, 592 (Mo.banc 1992). An offer of proof must show "(1) what the evidence will be; (2) its purpose and object; and (3) all facts necessary to establish its admissibility." State v. Edwards, 918 S.W.2d 841, 845 (Mo.App., W.D. 1996).

Moreover, appellant cannot complain on appeal that the ruling occurred in the presence of the jury (without him objecting to that fact at trial) because it is appellant's fault that the ruling occurred then because appellant was in the presence of the jury when he asked for the witness to be declared an expert. "A defendant may not complain of prejudice which his own conduct created." State v. McFerron, 890 S.W.2d 764, 767 (Mo.App., E.D. 1995)(defendant cannot complain that the trial court ruled on his motion for a judgment of acquittal in the presence of the jury because he made the motion in front of the jury). Appellant's failure to object to the ruling occurring in the presence of the jury and his failure to request a curative instruction is also fatal to his claim. "In the absence of a request for corrective action, the appellant is not now entitled to a new trial." State v. Champ, 477 S.W.2d 81, 82 (Mo. 1972)(case affirmed even though trial court denied motion for a judgment of acquittal within the hearing of the jury). Additionally, this Court has stated that "'Where the remarks of a judge are directed to counsel in ruling upon the admissibility of evidence and embodying the reasons on which the ruling is based ordinarily they are held to be not prejudicial.'" Id. (quoting State v. Phelps, 478 S.W.2d 304, 310 (Mo. 1972)); see also State v. Koonce, 731 S.W.2d 431, 441 (Mo.App., E.D. 1987). Thus, appellant's second point on appeal must fail.

III. and IV.

The trial court did not abuse its discretion when it allowed Dr. Russell Deidiker, a forensic pathologist, to testify about the size and shape of the stippling around the gunshot wound to the victim's head and about the effect of butalbital on a person because Dr. Deidiker had knowledge from education and experience that allowed him to aid the jury, and appellant was not prejudiced because the evidence in question was cumulative to other testimony.

In appellant's third point, he alleges that the trial court erred when it allowed Dr. Russell Deidiker, who was a forensic pathologist, to testify about the pattern of powder tattooing or powder stippling (sometimes known as powder burns) that he observed around the gunshot wound on the back of the victim's head and that it looked like a burn pattern that a criminalist had testified about (Appellant's Substitute Brief 81; Tr. 409-419). In his fourth point, he also alleges that the trial court erred when it allowed Dr Deidiker to testify about the effects of butalbital on a person (Appellant's Substitute Brief 86; Tr. 436). He claims that Dr. Deidiker was not qualified to testify as on either of these matters. Respondent will address these claims in one point, as appellant did while the case was in the Court of Appeals, because of the similarity of the issues involved.

A. Testimony about stippling

The record shows that Carl Rothove, a criminalist with the Missouri State Highway Patrol Laboratory, performed tests by firing the murder weapon from at numerous targets in order to shows the various patterns of burned and unburned gunpowder that resulted when the guns was fired at different distances and angles (Tr. 357-367).

Dr. Deidiker testified that he was a physician who was trained in anatomical, clinical and forensic pathology (Tr. 396-401). Pathology involves determining the cause of death (Tr. 397). Anatomical pathologies deals with autopsies (Tr. 397). Forensic pathology involves determining the manner and cause of deaths (Tr. 398). He had performed between 600 and 700 autopsies (Tr. 400). Appellant indicated that he had no objection to Dr. Deidiker testifying as an expert in the field of pathology (Tr. 401). Dr.

Deidiker testified, without objection, that the victim had been shot in the back of the head, and that there was powder tattooing or powder stippling around the wound (Tr. 409-410). The stippling results when unburned grains of gunpowder exiting the barrel of a firearm make abrasions to the skin and can become embedded in it (Tr. 410). He said that the area containing stippling was under the victim's hair and measured about four inches by a little more than two inches (Tr. 410, 418). He said that it was in a rectangular or ellipsoid pattern and that the bullet was located in the central area of the pattern (Tr. 410-411).

Over appellant's objection, Dr. Deidiker testified that the stippling pattern that he observed around the victim's gunshot wound was about the size and shape of the pattern of stippling that had been admitted into evidence during Carl Rothove's testimony and that had been conducted from a range of six inches (Tr. 416- 419). He later testified that based on his experience with gunshot wounds the range of the shooting was four to eight inches (Tr. 432).

The qualification of an expert is a matter resting primarily in the sound discretion of the trial court. State v. Seddens, 878 S.W.2d 89, 92 (Mo.App., E.D. 1994). The test of an expert's qualification is whether the expert has knowledge from education or experience which will aid the trier of fact. State v. Hart, 805 S.W.2d 234, 238 (Mo.App., E.D. 1991). The extent of an experts experience or training in a particular field goes to the weight rather than the admissibility of the testimony. St. Louis Southwestern v. Federal Compress, 803 S.W.2d 40, 43 (Mo.App., E.D. 1990); State v. Seddens, supra at 92.

"A witness may be qualified to testify as an expert even though his knowledge may have been gained by practical experience rather than by scientific or formal training." State v. Seddens, supra at 92 (police officer held qualified to testify as an expert on gang-related activity in a homicide trial based upon his practical experience as a police officer; any limitation in the officer's formal training went to the weight of the testimony, not its admissibility); State v. Futo, 932 S.W.2d 808, 820 (Mo.App., E.D. 1996), cert. denied, 520 U.S. 1143 (1997) (police officer properly allowed to give opinion on gunshot wounds based on his 15 years of experience as a homicide investigator).

The trial court did not abuse its discretion by permitting Dr. Deidiker to testify about the size and

shape of the stippling pattern surrounding the gunshot wound in the back of the victim's head and state that it was similar to the pattern that was made by Rothove because

it was within his expertise to testify about the nature of wounds and other matters found on a body. This was merely describing the size and shape of a pattern that was observed on the body.

Additionally, this testimony was not prejudicial because it was cumulative to other evidence. State v. Brown, 949 S.W.2d 639, 642 (Mo.App., E.D. 1997). Appellant does not object to the testimony of Dr. Deidiker that based on his experience with gunshot wounds he determined that the gunshot was made at a range of between four and eight inches from the victim's head (Tr. 432). Respondent gratuitously notes that it is recognized that forensic pathology deals with the "manner of death," State v. Knese, 985 S.W.2d 759, 768 (Mo.banc 1999), cert. denied 526 U.S. 1136 (1999), and forensic pathologists regularly testify about the range of a gun from the victim based on their observations of wounds. See State v. Kennedy, 842 S.W.2d 937, 940 (Mo.App., S.D. 1992); State v. Danikas, 11 S.W.3d 782, 786 (Mo.App., W.D. 1999). The testimony in question was also cumulative to appellant's testimony about how he walked up behind the victim and shot the victim in the back of the head (Tr. 675-677).

B. Testimony about effects of butalbital

The record shows that the trial court overruled appellant's objection when the prosecutor asked Dr. Deidiker about the effects of butalbital (Tr. 436). Dr. Deidiker then testified that butalbital was a sedative and that it typically caused people to become drowsy or sleepy (Tr. 436). Appellant did not object to any other testimony from Dr. Deidiker on this matter.

Dr. Deidiker was qualified to testify about the effects of this drug on people because he is a medical doctor (Tr. 401). It is well known that physicians are trained with drugs and have the ability to prescribe them. He was further qualified because he had been educated specifically on the drug in question. He testified that he was familiar with the literature on butalbital and its effects on people (Tr. 436). Thus, his education and training rendered his testimony helpful to the jury and admissible.

His testimony also was not prejudicial because it was cumulative to the testimony of Dr. Christopher Long, who was a forensic toxicologist (Tr. 443, 457-458). State v. Matheson, 919 S.W.2d

553, 557-558 (Mo.App., W.D. 1996). He also testified that butalbital is a sedative and makes people sleepy (Tr. 457-458). Thus, appellant's third and fourth points on appeal must fail.

V.

The trial court did not abuse its discretion when it denied appellant's claim in his motion for a new trial that Tony Cole thought that he may have been wrong when he testified that Kenneth Rutter's name, instead of appellant's, was on a near-empty container of butalbital that was found in appellant's home because (A) appellant's claim of newly discovered evidence is without merit in that it was cumulative to evidence that was presented during appellant's trial and appellant was aware during his trial that he could present other evidence on this matter (B) it was merely impeaching evidence, (C) appellant did not exercise due diligence in finding evidence on this matter, and (D) it was not so material that it would have probably have produced a different result in a new trial.

Appellant alleges that the trial court erred in not granting him a new trial because after the trial the medical examiner indicated that his testimony *may* have been wrong as to whether Kenneth Rutter's name was on one of the containers of butalbital that was found in appellant's home (Appellant's Substitute Brief. 89; Tr. 923-925). He briefs this as a claim of "newly discovered evidence" (Appellant's Amended Brief 89).

The following evidence was presented during appellant's trial on this issue: The autopsy of the victim's body revealed that it contained a nearly toxic level of butalbital (Tr. 453-458). In an effort to explain how appellant could have gotten this instrumentality that was used in the murder, the Iron County Medical Examiner, Tony Cole testified that he found a bottle of butalbital in appellant's home (Tr. 382). He said that the bottle had the name Kenneth Rutter on it (Tr. 382). That bottle only contained three pills, even though it had been refilled the day before the murder (Tr. 382-383).

On cross-examination of Cole, appellant's counsel showed Cole a prescription, Defendant's Exhibit B, that matched the prescription on the bottle that was found and tried to get it admitted into evidence, but he failed to lay a foundation for it to be admissible (Tr. 385-386). He cross-examined Cole about the fact that he did not possess the bottles so that he could not verify whether appellant's name was

on the bottle of butalbital (Tr. 384).

On cross-examination, appellant testified that he had a prescription for butalbital (Tr. 670). He said that he had ***not*** been filling that prescription using the name of his dead uncle (Tr. 671).

In appellant's motion for a new trial, appellant raised his claim on appeal (L.F. 132-133). At the hearing on appellant's motion for a new trial, Cole testified that after appellant's trial he began to think that he may have made a mistake when he testified in appellant's trial that Kenneth Rutter's name was on the bottle of drugs (Tr. 921-923). He said that he told the prosecutor of his uncertainty and that the prosecutor notified appellant's counsel (Tr. 923). He said that the bottle may have had appellant's name on it, but that he was not sure (Tr. 921-923). He said that he could not be sure unless he had the bottle and that he did not have it (Tr. 923-925). He said that the bottle of drugs had been take to the jail for appellant (Tr. 925). After hearing argument on appellant's motion for a new trial, the trial court denied it (Tr. 931).

"'New trials based on newly discovered evidence are not favored, and the trial court is vested with substantial discretion in deciding whether such should be granted.'" State v. Magee, 911 S.W.2d 307, 312 (Mo.App., W.D. 1995)(quoting State v. Amrine, 741 S.W.2d 665, 674 (Mo.banc 1987), cert. denied 456 U.S. 1017 (1988). To warrant a new trial based on newly discovered evidence post-trial, appellant must show: 1) the evidence has come to the knowledge of the appellant since the trial; 2) it was not owing to want of due diligence that the evidence was not discovered sooner; 3) the evidence is so material that it would probably produce a different result on a new trial; and 4) it is not cumulative only or merely impeaching the credibility of a witness. State v. Whitfield, 939 S.W.2d 361, 367 (Mo.banc 1997), cert. denied, 522 U.S. 831 (1997).

In the case at bar, appellant did not show that Cole's trial testimony was untrue. He merely showed that Cole was not unsure about whether his trial testimony on this matter was correct. Thus, this is merely impeaching evidence and will not support a claim of newly discovered evidence. State v. Gatewood, 965 S.W.2d 852, 858 (Mo.App., W.D. 1998).

The evidence will not support such a claim because it is cumulative to other testimony at appellant's trial. Appellant himself testified that he had a prescription for butalbital and that he had been filling that

prescription and that he had not been filling that prescription using the name of his dead uncle (Tr. 670-671).

Appellant failed to show that he acted with due diligence to obtain testimony on this matter and he failed to show that at the time of his trial he was not aware that the prescription in question was not his. He easily could have presented additional testimony showing that the prescription in question was his, if it was, though he did not do this at the hearing on his motion for a new trial. He could have laid a proper foundation and admitted his prescription into evidence, if it was his.

Further, the evidence was not so material that it would have produced a different result if it had been used to impeach Cole. First, the evidence was not material because Cole did not state that he was sure that his trial testimony was wrong. Second, the evidence was not material because the important part of the testimony was not whose name was on the prescription, but the fact that it had been refilled the day before the murder and all but three of the pills in the bottle were gone (Tr. 382-383). This indicated that the bottle of butalbital that was in appellant's possession was the source of the near toxic level of that drug that was found in the victim's bloodstream (Tr. 453-458). Third, this evidence did nothing to undermine the State's evidence that appellant was not acting in self-defense when he shot the victim in the back of the head.

In light of the above, respondent submits that the trial court did not abuse its discretion when it denied appellant's request for a new trial. Thus, appellant's fifth point on appeal must fail.

VI.

The trial court did not abuse its discretion when it refused to allow appellant and Steve Craigsmiles to testify about specific acts of violence of the victim, because appellant's offer of proof did not show that appellant was aware of all of the information in that offer of proof and the acts in question were not relevant in that they were not reasonably related to the crime for which appellant was being tried.

Appellant alleges that the trial court erred when it refused to admit evidence that the victim had gotten into a fight with a person other than appellant (Appellant's Substitute Brief 95; Tr. 569-589, 664-665).

The record shows that in an offer of proof during the presentation of the defense evidence appellant testified that the victim once told him that he beat up Steve Craigsmiles (Tr. 577). The victim allegedly said that the "got into it" over a basketball game and "he kicked his butt, hit him two or three times and beat him up" (Tr. 577). Appellant said that hearing of this caused him to fear the victim (Tr. 577). He said that the victim had a reputation for violence (Tr. 580).[7]

Steve Craigsmiles' testimony in the offer of proof contained far more information about the alleged incident than appellant was aware of. He testified that on June 27, 1998, he and his cousins and his sisters, who were involved with a family reunion, went to a basketball court to play basketball and the victim was there (Tr. 570-573). He said that one of his cousins yelled that the victim "humps his dog" (Tr. 574). He said that the victim thought that he was the one who said that, and that they got into a confrontation (Tr. 571-573). He said that the victim hit him three times in the face and gave him a scar on his lip (Tr. 573).

The trial court pointed out that under Waller evidence was not admissible if it was substantially different than the conduct involved in the case being tried (Tr. 583-584). The prosecutor pointed out that

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[7]On cross-examination in the offer of proof, though, he admitted that he and the victim were close friends, the victim was at his residence about four to five days a week, and that the victim was in appellant's residence with appellant's consent on the day of the murder (Tr. 580).

much of the testimony of Craigsmiles was inadmissible under Waller because it exceeded the information that appellant was aware of concerning the alleged fight (Tr. 588). The trial court rejected appellant's offer of proof (Tr. 589). However, it ruled that appellant could present evidence of the victim's reputation for violence (Tr. 589).

During appellant's testimony, appellant renewed his objection and asked for permission to present the evidence in the offer of proof (Tr. 664-665). The trial court again rejected his offer of proof (Tr. 664-665).

When a defendant asserts self-defense, a trial court may permit a defendant to adduce evidence of a victim's reputation for violence or evidence of the victim's prior specific acts of violence, State v. Hill, 982 S.W.2d 675, 681 (Mo.banc 1998), cert. denied 526 U.S. 1151 (1999), on the issue of the reasonableness of the defendant's apprehension that the victim was about to inflict bodily harm on the defendant. State v. Waller, 816 S.W.2d 212, 216 (Mo.banc 1991).

In order to lay a foundation for admissibility of such evidence, the defendant must show through other competent evidence that he was aware of the victim's reputation or acts of violence. Id.; State v. White, 909 S.W.2d 391, 394 (Mo.App., W.D. 1995); State v. Burns, 967 S.W.2d 195, 197 (Mo.App., E.D. 1998). The incidents testified to must not be too remote in time and must be of a quality such as to be capable of contributing to the defendant's fear of the victim. State v. Waller, supra at 916. They must be "reasonably related to the crime with which the defendant is charged." Id.

An offer of proof must show "(1) what the evidence will be; (2) its purpose and object; and (3) all facts necessary to establish its admissibility." State v. Edwards, 918 S.W.2d 841, 845 (Mo.App., W. D. 1996). "[I]t is for the proponent of the evidence to sever the good and bad parts of the offer." State v. Warren, 628 S.W.2d 410, 412 (Mo.App., S.D. 1982). "Part of it being inadmissible, the offer fails in its entirety." State v. Malicoat, 942 S.W.2d 458, 460 (Mo.App., S.D. 1997); State v. Nettles, 10 S.W.3d 521, 525 (Mo.App., E.D. 2000).

In the case at bar, appellant's offer of proof fails because it contains inadmissible evidence. It is clear that evidence about specific bad acts of the victim is not admissible if the victim was not aware of that

evidence. State v. Johns, 34 S.W.3d 93, 111 (Mo.banc 2000), cert. denied 121 S.Ct. 1745 (2001). Appellant's offer of proof contained substantial evidence about matters that appellant was not aware of. Appellant was not aware that Craigsmiles was injured in the fight and got a scar on his lip. Appellant was not aware that the confrontation involved Craigsmiles relatives. Appellant also was not aware that the confrontation was initiated by one of Craigsmiles relatives. Since the only evidence that is relevant is evidence that appellant was aware of and appellant was not aware of the above, appellant's offer of proof was infected with inadmissible evidence and was thus properly denied.

Additionally, the evidence in question was not admissible because it was not of a quality that would have been capable of contributing to the defendant's fear of the victim in that it was not "reasonably related to the crime with which the defendant [was] charged." State v. Waller, supra at 216. Evidence that the victim beat up someone after being falsely accused of engaging in bestiality with his dog is not evidence that would have caused the defendant to believe that the victim would have shot him with a firearm without any provocation. This case had nothing to do with fear of being punched by the victim. Thus, this evidence was irrelevant and inadmissible, the trial court did not abuse its discretion by excluding it, and appellant's sixth point on appeal must fail.

VII.

The trial court did not prejudice appellant by refusing to submit an instruction for the lesser included offense of voluntary manslaughter to the jury because no basis suggests that the jury would have convicted appellant of that offense if given the opportunity in light of the fact that it found that appellant was guilty of murder in the first degree and rejected finding him guilty of murder in the second degree.

Appellant alleges that the trial court erred by overruling his request to submit an instruction on voluntary manslaughter to the jury as a lesser included offense of murder in the first degree (Appellant's Substitute Brief 100; Tr. 849; L.F. 106).

However, this Court need not address whether the trial court erred by refusing to submit that instruction to the jury because appellant could not have been prejudiced by the trial court's actions. The relevant facts in this determination are that the jury was instructed on murder in the first degree and the lesser included offense of murder in the second degree (L.F. 96, 99). The jury rejected the lesser offense of murder in the second degree and convicted appellant of murder in the first degree (L.F. 111).

It is well-established that the fact that the jury convicted appellant of the highest offense charged, murder in the first degree, and refused to convict him of a lesser included offense, murder in the second degree, means that there is no reasonable basis to suggest that the jury would have convicted appellant of involuntary manslaughter if it had been given that opportunity. State v. Jones, 979 S.W.2d 171, 185 (Mo.banc 1998), cert. denied 525 U.S. 1112 (1999); State v. Barnett, 980 S.W.2d 297, 305-306 (Mo.banc 1998), cert. denied 525 U.S. 1161 (1999); State v. Hall, 982 S.W.2d 675, 682 (Mo.banc 1998), cert. denied 526 U.S. 1151 (1999).

Nor does he attempt to show that prejudice could have occurred. Instead, he simply asks this Court to reconsider State v. Winfield, 5 S.W.3d 505, 513 (Mo.banc 1999), cert. denied 528 U.S. 1130 (2000), that holds that he could not have been prejudiced under the facts of this case (Appellant's Substitute Brief 107). He offers, though, no persuasive reasons for reconsideration of this line of cases. Thus, appellant's seventh point must fail.

CONCLUSION

In view of the foregoing, the respondent submits that appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 11,969 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 8th day of August, 2002, to:

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